

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 94B138

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ALVIN SCOTT COLE,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,
PUEBLO COMMUNITY COLLEGE,

Respondent.

Hearing commenced in Denver on July 14, 1994 and concluded in Pueblo on September 22, 1994 before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Robin Rossenfeld, Assistant Attorney General. Complainant appeared in person and was represented by Vonda Hall, Attorney at Law.

Complainant testified in his own behalf and called the following other witnesses: Ed Taylor, Director, Colorado Community College System; Patricia Ruybal, Director of Personnel, Pueblo Community College; Penelope Law, Staff Assistant; Shirley Wagner, Administrative Assistant; and Daniel Tafoya, Director of College Book Store. Respondent's witnesses were: Ralph Huddin, Vice-President for Administrative Services, Pueblo Community College; Robert McGregor, Director of Physical Plant; and Patricia Ruybal, Director of Personnel.

Complainant's Exhibits A, C-1, C-2, C-3 and D through L, and

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Respondent's Exhibits 1 through 11 and 13 and 14 were received into evidence by stipulation of the parties. Complainant's Exhibit B was admitted over objection. Complainant's Exhibits M through R were admitted without objection. Respondent's Exhibits 12 and 15 were admitted without objection.

MATTER APPEALED

Complainant appeals the layoff that resulted from the abolishment of his position of Plant Maintenance Supervisor I.

ISSUES

1. Whether the procedures applicable to layoff were followed correctly, and if they were not, whether this failure had a substantial adverse impact on Complainant's rights;
2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law.

FINDINGS OF FACT

1. Complainant, Alvin Scott Cole, began his employment with Pueblo Community College (PCC) in October 1987 as a Licensed Electrician.
2. The president of the college is the appointing authority for all personnel actions.
3. Bob McGregor has been the director of physical plant operations on the PCC campus for about ten years. In the spring of 1988 the Academic Building was under construction. The college president decided to appoint an assistant to McGregor to supervise

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the daily activities of the physical plant in order to free McGregor to oversee the construction project. (Exhibits C-1 and 1.)

4. On May 26, 1988, Alvin Scott Cole was selected to fill the position of Assistant Physical Plant Director. (Exhibits C-2 and 2.) On June 1, 1988, Cole was officially assigned the duties of assisting McGregor in the daily operation of the physical plant. (Exhibits C-3 and 3.)

5. Cole was subsequently classified as Plant Maintenance Supervisor I. Although it was the intent of the college administration that McGregor would reassume the responsibility for the daily operation of the physical plant upon the completion of the Academic Building, Cole's position was made permanent since it was expected to last for more than six months.

6. The construction of the Academic Building was completed in December 1990. However, due to post-construction problems, McGregor continued to monitor the project and there was no change in Cole's duties of supervising the operations of the physical plant.

7. Approximately eighteen months after the actual construction of the building was completed, McGregor advised Ralph Huddin, Vice-President for Administrative Services, that he was ready to return to his duties as manager of the physical plant. Huddin so advised the President's cabinet, and the cabinet voted to revert to the original organizational structure, enabling McGregor to resume the duties of Plant Maintenance Supervisor.

8. Cole's position was reallocated downward from Plant Maintenance Supervisor I to Supervising Electrician. By letter

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dated February 24, 1993, Patricia Ruybal, Director of Personnel, advised Cole that he could either accept the demotion with saved pay or be laid off. (Exhibits J and 10.) Cole chose the first option. He did not appeal the reallocation to the State Personnel Director.

9. On June 21, 1993, Cole received a job performance evaluation (PACE) which contained criticisms of his supervisory abilities. Cole grieved this appraisal and, in his grievance, requested reinstatement to the position of Plant Maintenance Supervisor. The grievance was denied and Cole filed a petition for a discretionary hearing with the State Personnel Board. The petition for hearing was granted apparently on grounds that it appeared that what had actually happened was a structural reorganization rather than the reallocation of a position. If Cole had been laid off through reorganization and then placed in the position of Electrician, instead of having his position reallocated, he would have had the right of appeal to the State Personnel Board

10. The college administration was advised by the Attorney General's office to cancel the reallocation and instead administer a layoff because the duties of Cole's position of Plant Maintenance Supervisor no longer existed.

11. By letter dated February 28, 1994 to Ed Taylor, Director of Personnel for the Community College System, President May requested that the layoff be administered by Taylor, whose office is in Denver. The letter reads:

At the advice of Eric Decator with the Attorney General's office, Pueblo Community College will be laying off a classified employee, Mr. Al Cole. We had previously downgraded Mr. Cole's position from Plant Maintenance Supervisor to Electrician II, However, the

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classification action is being canceled, and a layoff will be conducted.

At Eric's advice, I am delegating the authority to your office to conduct this layoff for Pueblo Community College.

(Exhibit 11.)

12. By letter also dated February 28, 1994, Patricia Ruybal informed Cole that the classification was canceled and that he would be reinstated to the position of Plant Maintenance Supervisor. The letter reads:

After reviewing your appeal with the State Personnel Board, the College has decided to meet your requested remedy of reinstatement back to your former class of Plant Maintenance Supervisor I (present title is Plant Maintenance Supervisor). In order to do this, we will cancel the classification audit which was conducted on your position which changed your title to Supervising Electrician (present title is Electrician II). No back pay is involved since this classification action resulted in saved pay.

Because we are meeting your requested remedy, your appeal becomes a moot issue.

(Exhibit L.)

13. During this period of time, settlement negotiations concerning Cole's appeal were ongoing.

14. On April 20, 1994, Cole, who was represented by counsel, entered into a settlement agreement with PCC whereby Cole agreed to dismiss the grievance appeal and PCC agreed to restore Cole's position classification to Plant Maintenance Supervisor I at pay grade 90, step 6, effective as of November 1, 1993. The agreement specifically did not preclude PCC "from taking any action with

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respect to Cole's classification in the future." (Exhibit K.) Cole was under the impression that his position would eventually be changed to an electrician classification with saved pay for three years.

15. By letter dated April 22, 1994, Ed Taylor informed Cole that, effective June 6, 1994, Cole's position as Plant Maintenance Supervisor would be abolished "due to reorganization and resulting lack of work". Cole was advised that he could exercise retention rights to the position of Electrician I at pay grade 81, step 7. The difference in salary was \$3,735.00 per month versus \$3,141.00 per month. (Exhibits A and 13; see also, amendment, Exhibit 14.)

16. Exhibit 12 is the organizational chart for the physical plant. The chart displays Bob McGregor as Plant Manager I and Al Cole as Electrician I. This organizational chart was sent to Ed Taylor for his information in administering the layoff. Attached to the organizational chart were the stated reasons for the reorganization, as follows:

1. Organization chart (attached)

2. Reason for change:

When this assignment was first given to incumbent, it was agreed that the duties would last until Academic Bldg was completed; due to unforeseen circumstances, this assignment lasted longer than agreed upon. Due to workload, supervisor is now able to resume supervisory duties.

3. Anticipated benefits and results:

More efficient operation due to removing one layer of administration. Also, size of PCC campus does not justify another level of supervision.

4. Expected changes and effects on employees:
Supervision of maintenance staff will revert back to Physical Plant Director.

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(Exhibit 12, p. 2.)

17. Ed Taylor mailed the organizational chart back to PCC, and it was received in the personnel office on April 25, 1994. That day Patricia Ruybal distributed a copy of the chart to each building on campus. Bob McGregor posted the chart on the bulletin board in the physical plant.

18. Cole accepted the Electrician I position. He is currently the only electrician on campus. The other position for an electrician was abolished when it became vacant upon the resignation of the incumbent.

19. Complainant received the notice of layoff on April 23, 1994 and filed a timely appeal.

DISCUSSION

The administrative actions of an appointing authority enjoy a legal presumption of regularity. It is thus Complainant's burden, unlike in a disciplinary proceeding, to prove by preponderant evidence that Respondent's action was arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S. (1988 Repl. Vol. 10B).

It is Complainant's contention that the reorganization was a sham for not paying him at the level of Plant Maintenance Supervisor I at a savings to the agency of \$600.00 per month. Respondent counters that the reorganization was proper because there was not enough work to warrant two supervisors and that the agency appropriately exercised its discretion in choosing to not grant saved pay to Complainant.

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Rule R9-3-1, 4 Code Colo. Reg. 801-1, provides:

Reasons. The only reasons for layoffs are lack of funds, lack of work, or reorganization.

A reorganization, when not caused by either lack of funds or lack of work, must require changes to the fundamental structure, positions, and/or functions accountable to one or more appointing authorities.

In the case of reorganization, when not caused by either lack of funds or lack of work, a written plan of reorganization shall be developed. The plan shall include a chart of the organization, the reasons for the changes, the anticipated benefits and results, and, at least in general terms, the expected changes and their effects on employees. The written plan shall be posted in a conspicuous and accessible place at the work site for a period of at least 45 days beginning with the first notice of layoff pursuant to the plan.

This rule requires that a written plan of reorganization be developed unless the reorganization is caused by either lack of funds or lack of work. Here, the reorganization was caused by lack of work and a written plan was not necessary. The plan developed by the agency simply reflects a reassignment of duties necessitated by the completion of the construction project. At that point there was no longer a need for two Plant Maintenance Supervisors. Nor was there a need for a Supervising Electrician, which would require that the college employ a total of three electricians. The college has never had three electricians. The normal workload only requires the services of one. The reorganization thus did not cause the lack of work, but rather was caused by it. Currently, the one available electrician position is filled by Complainant. This is not improper, even though the agency explained its action through an unnecessary written plan. Complainant was properly informed of his retention rights and right of appeal.

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The question presented is one of saved pay, i.e., whether Complainant should have been granted saved pay when he was demoted from the position of Plant Maintenance Supervisor to Electrician I.

Rule R9-3-7(J), 4 Code Colo. Reg. 801-1, provides:

Saved Pay. Notwithstanding any other provision, if an employee is demoted in the layoff process, such demotion is considered to be non-disciplinary and non-voluntary in nature. Under these circumstances, in accordance with the Chapter 3 rules and procedures governing non-disciplinary demotions, in the discretion of the appointing authority, the employee's pay may be saved at a higher step or adjusted downward step for step in the new pay grade, provided that either alternative is implemented consistently for the same occurrence throughout the department.

In the case of a demotion in which pay is not sustained the agency may at some later date choose to place the employee at any step up to the step the employee could have been granted had pay been saved.

Complainant's demotion through the layoff process was non-disciplinary and non-voluntary. Under these circumstances, at the discretion of the appointing authority, Complainant's pay could either have been saved or adjusted downward. The appointing authority chose the latter alternative.

An abuse of the appointing authority's discretion would occur if the decision regarding saved pay were not implemented consistently for the same occurrence throughout the department. For instance, an abuse of discretion would be implied where ten employees were demoted through a layoff and only nine were given saved pay. Or, an abuse of discretion might be inferred if the agency had always granted saved pay under similar conditions in the past but,

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without reasonable explanation, changed its policy to affect certain employees in a current situation.

Neither of the above examples can be applied to the instant case.

Complainant was the sole employee demoted. There is no evidence of the past practices of PCC. Nevertheless, an abuse of discretion can be found in the agency's decision to not grant saved pay to Alvin Scott Cole.

On February 28, 1994, the same day that President May wrote to Ed Taylor in Denver advising Taylor that Cole would be laid off, Patricia Ruybal wrote to Cole advising him that the downward reallocation of his position would be canceled, that he would be reinstated to the position of Plant Maintenance Supervisor and that his appeal would then become moot. Ruybal's letter did not mention that the layoff decision had already been made, a fact which was concealed during the negotiations to settle Complainant's then pending appeal.

On April 22, 1994, two days after Complainant had agreed in writing to voluntarily dismiss his grievance appeal upon being restored to the classification of Plant Maintenance Supervisor, the layoff letter was sent from Ed Taylor's office advising Complainant that his position was being abolished and that he would consequently be laid off.

Complainant did not know that the reason the agency canceled the classification audit and agreed to restore him to the higher level position was that they had decided to lay him off instead. Had this information been disclosed, the outcome of the settlement negotiations might have been different. Complainant may very well have not agreed to settle the case under the stated conditions. That case may have had a different result. The present action may

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never have come to pass. In fact, in the February 24, 1993 letter advising him of the downward reallocation of his position, which was subsequently canceled, Complainant was given the option of accepting the demotion with saved pay or being laid off. He was given three days to make his decision. He accepted the demotion and did not challenge the reallocation.

It is found that PCC acted in bad faith in settling the earlier case. With record support, the administrative law judge draws the inference that not only was the layoff decision made without disclosure to Complainant, so was the decision to not grant saved pay. By this act of bad faith, the agency abused its discretion in not saving Complainant's pay at the higher rate. This abuse of discretion constitutes arbitrary and capricious conduct by Respondent.

Pursuant to R9-3-7(J), the agency is not forever bound by its original decision against saving pay but may, at some later date, choose to place the employee at a higher step.

An employee may not be kept at a saved pay rate for longer than three years from the effective date of the demotion. Policy 3-5(A), 4 Code Colo. Reg. 801-1. When an employee is demoted through a job evaluation action, salary must be maintained at the prior salary level. Policy 3-5(B), 4 Code Colo. Reg. 801-1.

The subject settlement agreement restored Complainant's classification to Plant Maintenance Supervisor I at pay grade 90, step 6. The layoff was effective at the close of business on June 6, 1994. The fair and appropriate remedy under the circumstances is to grant saved pay per that rate and effective date for a period of three years.

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Neither party requested an award of attorney's fees. See Rule R10-6-3, 4 Code Colo. Reg. 801-1.

CONCLUSIONS OF LAW

1. The procedures applicable to layoff were followed correctly, except that a written plan of reorganization was not necessary, but the development of a written plan did not have a substantial adverse impact on Complainant's rights.

2. Respondent's action was arbitrary or capricious because Respondent negotiated in bad faith in settling Complainant's earlier appeal and abused its discretion in not granting saved pay in the layoff process.

ORDER

Respondent shall grant saved pay to Complainant at pay grade 90, step 6 for a period of three years beginning June 7, 1994. Complainant shall receive back pay and benefits accordingly. Respondent's action is otherwise affirmed.

DATED this _____ day of
October, 1994, at
Denver, Colorado.

Robert W. Thompson, Jr.
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the _____ day of October, 1994, I placed

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true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Vonda G. Hall
Attorney at Law
C.A.P.E.
1390 Logan Street, Suite 402
Denver, CO 80203

and in the interagency mail, addressed as follows:

Robin R. Rossenfeld
Assistant Attorney General
Department of Law
Human Resources Section
1525 Sherman Street, 5th Floor
Denver, CO 80203

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

- 1. To abide by the decision of the Administrative Law Judge ("ALJ").***
- 2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties and advance the cost therefor. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal***

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must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

*The party appealing the decision of the ALJ - APPELLANT - must pay the cost to prepare the record on appeal. The estimated cost to prepare the record on appeal in this case without a transcript is **\$50.00**. The estimated cost to prepare the record on appeal in this case with a transcript is **\$1,085.00**. Payment of the estimated cost for the type of record requested on appeal must accompany the notice of appeal. If payment is not received at the time the notice of appeal is filed then no record will be issued. Payment may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. If the actual cost of preparing the record on appeal is more than the estimated cost paid by the appealing party, then the additional cost must be paid by the appealing party prior to the date the record on appeal is to be issued by the Board. If the actual cost of preparing the record on appeal is less than the estimated cost paid by the appealing party, then the difference will be refunded.*

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 1/2 inch by 11 inch paper only. Rule R10-10-5, 4 Code of Colo. Reg. 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 Code of Colo. Reg. 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 Code of Colo. Reg. 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.